99TH CONGRESS
2d Session

SENATE

EXEC. REPT.
99-28

1984 PROTOCOLS AMENDING THE CIVIL LIABILITY AND FUND CONVENTIONS ON OIL POLLUTION DAMAGE

OCTOBER 16 (legislative day, OCTOBER 10), 1986.—Ordered to be printed

---

Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 99-12]

The Committee on Foreign Relations, to which was referred the two Protocols: (A) The Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention); and (B) The Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention), having considered the same, reports favorably thereon with one reservation, six understandings and one declaration to the Civil Liability Convention; and two understandings and two declarations to the Fund Convention, and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The Civil Liability Convention (CLC) would limit the liability of shipowners for oil pollution damage resulting from the discharge of persistent oils by tankers. The Fund Convention (FC) would provide coverage for oil pollution damages exceeding the shipowners' liability limit up to 200 million International Monetary Fund Special Drawing Rights (SDR) per incident.

BACKGROUND

The sinking of the tanker Torrey Canyon off the British coast in 1967 highlighted the necessity of establishing some international mechanism to compensate for marine oil pollution damage caused by such accidents. In 1969 a conference held in Brussels under the auspices of the Intergovernmental Maritime Consultative Organization, currently the International Maritime Organization (IMO),

91-119 O

S384-14

concluded the Civil Liability Convention (CLC). The CLC limits a tanker owner's liability for oil pollution damage to $16.5 million for the largest tankers.

As the CLC was being negotiated, it became apparent that the liability limits established under its provisions were likely to be insufficient to cover many significant oil spills. Therefore, in 1971, under the auspices of IMO, a second convention—The Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund)—was negotiated to provide coverage over and above the limits established by the CLC. Moneys for the Fund are derived from contributions from member states based on their seaborne oil receipts. At present, the combined CLC and Fund coverage totals 45 million in International Monetary Fund Special Drawing Rights (SDRs), approximately $53 million.

The United States did not become a party to either convention, although 57 states have become parties to the CLC, and 34 to the Fund. The U.S. failed to ratify either convention largely because critics of the conventions successfully argued that the 1969/1971 CLC/Fund coverage was inadequate. Officials from U.S. coastal States in particular held this view, and were therefore reluctant to support ratification in light of the fact that states' oil pollution liability laws would be pre-empted once the conventions entered into force, leaving no other avenue for compensation for damages in the event of a major accident.

In the early 1980's, work began on Protocols to the 1969–1971 Conventions. These were approved at a conference in London in May, 1984. The following nine states have signed the Protocols: the United Kingdom, the United States, Sweden, Poland, Portugal, Federal Republic of Germany, Morocco, France, and Denmark; although none has ratified them as yet.

Summary

The regime which the Protocols would create would apply to pollution damage resulting from the discharge or substantial threat of a discharge of persistent oil by sea-going tankers or combination carriers, laden or unladen, or by ocean-going barges. Ships up to 5,000 tons would be liable for damages up to 3 million SDR's, approximately $3.5 million. The liability limit would increase, according to vessel size, up to 59.7 million SDR's, approximately $70 million. Vessels would be required to carry proof of financial responsibility as a condition of entry into a party's waters.

In the event that damages from a spill were to exceed the shipowners' liability limit, the Fund would provide coverage up to 200 million SDR's per incident, approximately $236 million, provided that a sufficient number of large oil consuming states become parties to the Protocol (three countries whose annual total oil receipts equal or exceed 600 million tons), otherwise the coverage per incident may not exceed 135 million SDR's, approximately $159 million. The Fund would be financed by contributions from states according to their seaborne oil receipts. (The implementing legislation under consideration would have the United States avail itself of Article 14 of the Convention, and utilize a domestic oil spill compensation fund to pay the contributions due from U.S. oil receivers.

The domestic fund would be financed by a fee on oil produced in and imported into the United States.) The regime would cover damages in the territory of a party, the territorial sea, and the 200 mile Exclusive Economic Zone.

Committee Comments and Recommendations

INTRODUCTION

The committee believes that ratification of the Protocols is in the interest of the United States because the Protocols create a framework for swiftness of settlement and certainty of enforcement in case of oil pollution damage. However, the committee also recognizes that the Protocols would form only a small part of a comprehensive regime for oil pollution damage. Therefore, throughout its consideration of the Protocols, the committee has worked closely with interested U.S. coastal States and with the Senate Committee on Environment and Public Works. Consequently, the committee recommends that the Senate advise and consent to ratification subject to Reservation to the CLC, six Understandings to the CLC, and two Understandings to the FC. The committee believes that ratification subject to these conditions is the best way to synchronize the Protocols with the United States comprehensive oil pollution legislation being considered by Congress so as to preserve existing state liability regimes, and to protect other legitimate interests of the coastal States.

In considering the Protocols, it is important to note that they, are the committee's recommendation, are the result of a series of carefully crafted compromises. There is no other way to create a regime for a subject which touches upon so many interests. For example, some believe the Protocols' definition of oil pollution damage to be too narrow; others find it too broad. Some believe that tanker owners should bear more liability; others believe that their liability is too high. The committee heard witnesses from the Oil industry, shipping industry and environmental groups. The committee believes that the Administration fairly balanced all views in formulating the U.S. position.

The Protocols must be viewed in the context of proposed comprehensive Federal oil pollution regimes which have passed both Houses of Congress and are currently in conference. While the Protocols offer considerable benefits, it became apparent that some states may offer additional protection to their citizens. Therefore, further compromise was necessary. The recommended reservation to the CLC would allow the United States to benefit from the Protocols while being consistent with the comprehensive domestic legislation passed by the Senate, and preserving existing state systems in case of a truly catastrophic oil pollution incident. The committee has consulted with all interested parties, including several foreign countries, and concluded that this compromise is feasible and fair. The committee urges the Senate to consider the recommended package in this light.

THE RESERVATION

Article III, paragraph 4 of the CLC, as amended by Article 4, paragraph 2 of the 1984 Protocol effectively pre-empts action for "pollution damage" against shipowners under any other law. This had the effect of limiting the liability of shipowners for pollution damage to the amounts set forth in Article V, paragraph 1, of the CLC, as amended by Article 6, paragraph 1, of the 1984 Protocol. Furthermore, action against the crew, pilots, charterers, or persons engaged in salvage operations or preventive measures is precluded. In these respects, the Protocols would pre-empt the liability laws of some states. Some believe that this would be inappropriate if there were a case in which state laws would have provided compensation for oil pollution damages, except that they had been pre-empted by the Protocols. On the other hand, it was impossible to reap the benefits offered by the Protocols without some pre-emption of state liability laws. The solution is the reservation recommended by the committee.

Under the reservation, the Protocols would be implemented according to their own terms. Any claimant would have to pursue claims for oil pollution damage, as defined in Article I, paragraph 6, of the CLC, as amended by Article 2, paragraph 3 of the 1984 Protocol, strictly according to the procedures set forth in the CLC, as amended. A claimant would then have to pursue the further remedies available under the FC, as amended. No recourse to state or common law would yet be available. However, a claimant, having pursued and exhausted all of the remedies available under the CLC and FC, as amended, and under the applicable U.S. Federal oil pollution damage liability and compensation statute, in that order, could then seek recovery in the state courts under state or common laws.

The reservation recognizes that in case of a truly catastrophic oil pollution incident, some states provide their citizens with protection which is potentially greater than that which would be provided by the Protocols and Federal law combined. The committee does not intend to provide claimants with a second avenue of recovery for damages which have already been ruled upon by a competent court, or settled upon, under the procedures of the Protocols or Federal law, or both. Rather, the committee intends to provide for such damages as might arise from a rare and catastrophic incident.

The committee recommends the reservation under the assumption that applicable Federal law will provide for some type of domestic fund designed to pay for oil pollution damages. For such damages as are covered by the definition in Article I, paragraph 6, of the CLC, as amended by Article 2, paragraph 3 of the Protocol, the committee intends that a claimant would first proceed according to the Protocols, and then, if uncompensated damages still remained, would proceed to seek recovery from the domestic fund according to U.S. Federal law. If at any time that the Protocols are in force for the United States, such a U.S. Federal law does not apply, then a claimant would have recourse to the state courts under state or common law upon exhaustion of all the remedies available under the Protocols. The committee does not intend to create a gap between the regime created by the Protocols and a claimant's abili-

ty to seek recovery under state or common law, but only to impose the following order: (1) shipowners liability under the CLC, as amended; (2) the FC, as amended; (3) an applicable Federal fund, if any, and (4) state or common law, understanding that this would be third if no Federal fund applies.

The last phrase of the reservation was added to make clear that when a claimant, having uncompensated damages, has exhausted all the remedies under the Protocols and under Federal law, seeks recovery under state or common law, it is not the intent of the reservation to draw upon any aspect of the Protocols to create any aspect of state or common law not otherwise found in them. Naturally, a claimant would retain any compensation awarded under the Protocols or Federal law, and would not forfeit any of it by seeking recovery, in accordance with the reservation, of uncompensated damages in the state courts. Some examples of benefits provided by the Protocols which the committee does not intend would apply under state or common law, unless otherwise provided for by state or common law, include: (1) the obligation of the shipowner to establish a fund in order to limit liability; (2) the obligation of the shipowner to establish and maintain financial responsibility; (3) provision for direct action against the person providing financial security for the shipowner; and (4) establishing internationally recognized and enforceable jurisdiction over a shipowner, its guarantor, and the International Fund. Thus, the existence of these and other rights and obligations under CLC and FC neither adds to nor detracts from the rights and obligations of any party which may exist under the State statute or common law upon which an action is brought in accordance with this reservation.

This reservation allows implementation of the Protocols while retaining the further protection which some states afford in some circumstances. Some regard this approach as inconsistent. As a practical matter, however, it is a precaution which is not burdensome, and will have little effect on the operation of the Protocols.

When the Protocols are fully implemented, shipowner liability and the fund would provide up to 200 million SDR's, currently about $230 million for covered oil pollution damage. The Federal fund now under consideration would provide more than this, perhaps up to a total of $500 million. There has never been an oil pollution incident for which damages have exceeded the amount which the fully implemented FC would have provide for. (Claims currently under litigation resulting from the Amoco Cadiz spill may exceed $230 million.) Indeed there have only been a half dozen, or so, spills resulting in damages over $30 million. Therefore, assuming the limits are updated, as may easily be done under the Protocols' own terms, the possibility of recourse to the state courts is reasonably remote. The international community need not fear that the U.S. reservation will disrupt the regime negotiated.

THE UNDERSTANDINGS

At the outset of the committee's consideration of the Protocols, the Chairman, Senator Lugar, and the Ranking Minority Member, Senator Pell, solicited the views of the coastal States' governors. All responses were favorable, but some States did raise specific con-

cerns which the committee believes are best handled by attaching understandings to our instruments of ratification. The committee would like especially to thank the States of Alaska, California, Delaware and Washington for their contributions. The understandings do not change anything in the Protocols or in their intent as determined from the negotiating record and Administration comments. Rather, they only clarify certain aspects of the Protocols such as the definition of oil pollution damage.

The recommended Understandings address the following:

—that claims for tax revenue lost due to oil pollution damage are not excluded by the Protocols;

—that awards for two or more claims could be combined to repair damage to the same or adjacent areas;

—that the definition of oil pollution damage includes loss of profit due to oil pollution damage;

—that any damage excluded from the Protocols may be provided for by State or Federal law;

—that the definition of pollution includes the loss of subsistence resources; and

—that the definition of oil pollution damage includes the costs of investigation, assessment and court costs.

EFFECT ON STATES

It should be emphasized that since the U.S. Federal and State governments are natural resource trustees responsible to the public for the protection of natural resources subject to their jurisdiction, such trustees have standing to bring suit under the Protocols to recover natural resource damages.

It is furthermore important to note that the entry into force of the Protocols will have a very limited effect on state law, whether existing at that time or enacted later. First, the Protocols will not prevent a State from establishing or maintaining oil spill response funds, or indeed any fund whatsoever. This would apply to any financing mechanism established by a State for such a fund. Second, the Protocols would not affect any remedies available under State law (or any other law) for injury claims relating to damages which are not "pollution damage" under the Protocols. Third, civil penalties, or other sanctions, which may be imposed for unlawful conduct are not "pollution damage". As a consequence their imposition will not be subject to, nor affected by, the entry into force of the Protocols for the United States.

THE DECLARATIONS

In its transmittal of the Protocols to the Senate, the Administration recommended one declaration on the CLC and two on the FC. They are technical in nature, and the committee, in turn, recommends them to the Senate.

MATHEMATICAL FORMULAS

The Administration recommended an understanding on each of the CLC and FC on the definition of oil pollution damage contained in the Protocols. This understanding would have excluded "Com-

pensation assessed on the basis of abstract qualifications of damage calculated in accordance with theoretical models." In writing the recommended understanding, the Administration was responding to a case in which the Soviet Union recovered natural resource damages determined by a mathematical calculation involving the amount of oil spilled and the volume of water affected, rather than on any actual damage. The committee believes the Administration's concern to be well founded. However, under current U.S. law and practice, mathematical formulas are used to assess the value of damages. The understanding, as proposed, could be misconstrued in a way which would work against a reasonable method of settlement actually used in the United States. Therefore, the committee has not included this understanding in its recommendation to the Senate.

This decision should not be interpreted to mean that the committee does not recognize the Administration's concern in this regard, and support its view of the underlying principle involved. The committee believes that damages under the Protocols can only be awarded when actual impairment of the environment has been established and actual plans and preparations for reasonable measures of reinstatement have been completed with a demonstrated intention to carry them out expeditiously, or in a currently planned phased manner. The reasonableness of such measures to be undertaken should be determined taking into account such factors as technical feasibility, harmful side-effects, compatibility with, or duplication of, expected natural regeneration, and the extent to which such measures at some point may be expected to become redundant or disproportionately expensive. The committee further believe that damages can only be awarded under the Protocols for pollution damage resulting from the particular incident for which such liability is established, and not for any other incident or purpose.

Thus the committee wholeheartedly accepts the logic by which the Administration suggested the understanding. It does not wish to upset American practices with regard to the use of mathematical formulas when actual impairment to the environment has been demonstrated, and reasonable measures for reinstatement are planned. The difference between such cases and the Soviet case mentioned above should be clear.

TIMING

The committee has worked closely with the Committee on Environment and Public Works to make the Protocols compatible with the Senate's Federal oil pollution liability and compensation bill. The resolutions of ratification have been written accordingly. The committee recommends that the Senate act on the Protocols only after passage by both Houses of a domestic oil pollution liability and compensation bill acceptable to the Administration.

COMMITTEE ACTION

The committee held a hearing on the Protocols, chaired by Senator Evans, on May 15, 1986. The following witnesses appeared: Senator Robert T. Stafford; Senator George J. Mitchell; The Honorable

Elizabeth Hanford Dole, Secretary of Transportation; Rear Admiral J. William Kime, Chief, Office of Merchant Marine Safety, United States Coast Guard; The Honorable John D. Negroponte, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs; Frank J. Iarossi, President, Exxon Shipping Company; Clifton Curtis, President, The Oceanic Society; and James H. Rand, Chairman, International Association of Independent Tanker Owners. The committee considered the Protocols at its Business Meeting on October 8, 1986, and ordered it favorably reported to the Senate for its advice and consent by a vote of 17–0. Voting in the affirmative were: Senators Lugar, Helms, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Zorinsky, Cranston, Dodd, Eagleton, and Kerry.

SECTION-BY-SECTION ANALYSIS

Because these two Protocols constitute significant revisions of existing Conventions, it is difficult to provide a comprehensive analysis of them by limiting the discussion to the provisions of the instruments themselves. Consequently, this portion of the Report will take the form of an article-by-article analysis of the 1969 CLC and 1971 FC Conventions, as amended by their respective 1984 Protocols. Provisions that have been added or revised by the Protocols will be denoted with an asterisk, and their source in the Protocols will be cited. Unless otherwise noted, references to the "Convention" will mean the so-called 1984 Liability Convention or the 1984 Fund Convention, as appropriate.

A. CLC

Article I. Defines the following terms:

—"ship" to include certain unladen vessels capable of carrying oil in bulk as cargo* (Art. 2.1);

—"person" to include natural and juridical persons including a state or governmental bodies;

—"owner";

—"State of the ship's registry";

—"oil" to include persistent hydrocarbon mineral oils* (Art. 2.2);

—"Pollution damage" to include damage outside the ship from contamination due to oil escape or discharge, including environmental impairment to the extent of loss of profit and the costs of reasonable measures of reinstatement actually undertaken or to be undertaken and preventive measures* (Art. 2.3);

—"preventive measures" to include reasonable measures taken after an incident occurs;

---

* Twelve months after the end of that time period the Protocols will enter into force for the declaring State. It is important here to note that, notwithstanding the declarations, all States which have deposited instruments of ratification, acceptance, approval, or accession respecting the 1984 FC Protocol and their contributing oil receipts will be taken into account in determining the point at which the mandatory denunciations must be made.

—"incident" to include occurrences causing pollution damage or creating grave and imminent threats of pollution damage* (Art. 2.4);

—"Organization" to mean IMO* (Art. 2.5).

—"1969 Liability Convention"* (Art. 2.6).

Article II. Applies the Convention (a) to pollution damage in a Party's territory, including territorial sea, and in an exclusive economic zone or other zone, up to 200 nautical miles, properly declared in accordance with international law, and (b) to measures, wherever taken, to prevent such damage.* (Art. 3).

Article III. Establishes the basic liability regime:

—Imposes liability, except as otherwise provided, on the person owning the ship at the time of the incident causing pollution damage.* (Art. 4.1).

—Exempts the owner from liability when damage results from specified causes, including armed conflict, act of God, third party acts done with intent to cause damage, and negligence of authorities responsible for maintaining lights or other navigational aids.

—Exonerates the owner, wholly or partially, for liability for damage caused by negligence of the claimant or acts of the claimant done with intent to cause damage.

—Limits pollution damage claims against the owner to those made under the Convention; insulates from liability certain persons, including the owner's servants or agents, pilots, charterers, salvors and persons performing preventive measures, unless they cause damage intentionally or recklessly with knowledge that damage would probably occur.* (Art. 4.2).

—Owner's rights of recourse are not prejudiced.

Article IV. Unless damages are reasonably separable, owners of all ships involved in an incident are jointly and severally liable for all damages.* (Art. 5).

Article V. Establishes the liability limitation system:

—Owner's liability is limited to 3 million SDRs ("units of account") for the first 5000 tons and 420 SDRs per additional ton, to a maximum of 59.7 million SDRs.* (Art. 6.1)

—Liability may be limited unless it is proved that pollution damage was caused by the owner's act with intent to cause damage, or recklessly with knowledge that damage would probably result.* (Art. 6.2)

—To limit his liability, the owner must constitute a fund with the court or other competent body in a State in which a claim is brought or, if none is yet brought, with such a body in any Party in which a claim may be brought.* (Art 6.3)

—Such a fund shall be distributed to claimants *pro rata*.

—If the owner or his insurer has paid pollution damage compensation before distribution of the fund, he shall be subrogated to the claimant's rights against the fund.

—Other persons making pollution damage compensation payments may also be so subrogated, to the extent permitted by national law.

—Where the owner establishes that he will later have to pay for pollution damage in cases under which subrogation would otherwise be permitted, an amount may be set aside from the fund to cover such payments.

—Voluntary expenses reasonably incurred and sacrifices reasonably made by the owner to prevent or minimize pollution damage stand on an equal footing with other claims against the fund.

—The "unit of account" is the SDR, to be valued in the appropriate national currency on the date of the constitution of the fund. Special provisions are made for calculating the national currency value for States not members of the International Monetary Fund.* (Art 6.4)

—Tonnage is measured in accordance with the 1979 International Convention on the Measurement of Tonnage of Ships.* (Art 6.5)

—Even if the owner may not limit his liability, the insurer may constitute a fund, but this shall not prejudice any claimant's rights against the owner.* (Art 6.6)

Article VI. Where a fund has been constituted and the owner is entitled to limit his liability, no person having access to the body holding the fund and to whom funds are actually available may exercise any other claim against the owner's assets.

Article VII. Establishes mandatory insurance for some vessels:

—Owners of ships that are registered in Parties and that carry over 2000 tons of oil in bulk as cargo must maintain insurance or other financial security sufficient to cover their limits of liability.

—Certificates of financial security, in a specified form, shall be issued by appropriate authorities of Parties. Each Party shall issue certificates for ships of its own registry; any Party may issue certificates for vessels registered in non-Parties.* (Art 7.1)

—Certificates shall be in specified languages, including either French or English; copies shall be carried on board and shall be deposited with specified authorities.* (Art 7.2)

—Other than for lapse of time, insurance or other financial security may not be terminable, except upon certificate surrender to appropriate authorities, upon insurance of a new certificate or upon three months' notice to appropriate authorities. Subject to this Article, registry States shall determine the conditions of certificates of insurance.

—Certificates issued by a Party in accordance with this Article shall have the same force and effect in any other Party as a certificate issued by the latter.* (Art. 7.3, 7.4)

—Claims may be brought directly against the insurer or other person providing financial security. In such a case the insurer or other person may limit liability (even if the owner may not), may invoke most of the defenses invocable by the owner and may invoke the defense that the pollution damage resulted from the owner's willful misconduct.* (Art. 7.5)

—Parties shall not permit their flag vessels, to which this article applies, to trade without holding the required certificate. Parties shall not permit any vessels to which this article applies to enter or leave port or offshore installations without required certificates. Such Parties may issue appropriate certificates to such vessels of non-Parties, or they may authorize other States to do so on their behalf.

Article VIII. Establishes a limitation period for bringing actions: three years from the date on which damage was suffered, but not more than six years from the date of the incident.

Article IX. Provides that an action for compensation may only be brought in a competent court of the Party or Parties in whose land, territorial sea or other appropriate area pollution damage occurred or as to whose such areas preventive measures were taken. After a fund has been constituted in accordance with Article V, the courts of the Party in which it is constituted shall be exclusively competent to deal with its apportionment and distribution.* (Art. 8)

Article X. A final judgment in one Party, no longer subject to ordinary review, shall, upon compliance with necessary formalities, be enforceable in any other Party, unless obtained by fraud or without the defendant's having received reasonable notice and an opportunity to present his case.

Article XI. The Convention does not apply to warships or other governmental ships then used on non-commerical service. Ships owned by Parties and used on commerical service are liable to suit, and sovereign immunity for such vessels is waived.

Article XII. The Convention supersedes other conventions to the extent that there is a conflict, but does not affect the obligations of Parties to non-Parties.

Article XII bis. Establishes the following transitional provisions for States that are Parties to both the 1969 CLC and the 1984 Protocol:

—Liability for pollution damage under the Protocol shall be considered discharged if, and to the extent that, it also arises under the 1969 CLC.

—Where the State is also a Party to the 1971 FC, liability not discharged under the 1969 CLC shall arise under the 1984 CLC Protocol only to the extent that pollution damage remains uncompensated after recourse to the Fund under the 1971 FC Convention.

—The required amount of an owner's liability fund constituted under Article V shall be reduced by amounts paid under the 1969 CLC Convention.* (Art. 9)

Article XII ter. Articles 12 to 18 of the 1984 Protocol constitute the final clauses of the so-called 1984 Convention.* (Art. 9)

Protocol articles not amending parts of the 1969 Convention. The following articles, including the final clauses referred to in Article XII ter, above, do not in and of themselves amend provisions of the 1969 CLC even though effectively Articles 12 through 18 replace Articles XIII through Article XXI of the 1969 CLC by reason of new Article XII ter:

Article 10. Establishes a revised form for certificates of insurance.

Article 11. Declares that, as between Parties to the Protocol, the 1969 CLC and the Protocol shall be read together as one instrument and that Articles I through XII ter, as amended by the Protocol, shall be known as the 1984 Liability Convention.

Article 12. Deals with signature and ratification:

—Open for signature December 1, 1984 to November 30, 1985, with States becoming Parties by (a) signature followed by ratification, acceptance or approval or (b) accession.

—A State Party to the 1971 FC Convention may only ratify, etc. this Protocol if it ratifies, etc. the 1984 FC Protocol, or if it denounces the 1971 FC Convention, to take effect at the time the 1984 CLC Protocol enters into force for it.

—A State Party to the 1984 Protocol, but not a Party to the 1969 CLC, shall be bound by the 1969 CLC as amended, with respect to other 1984 Protocol Parties, but shall not be bound by the 1969 CLC with respect to CLC Parties not also Parties to the 1984 Protocol.

Article 13. Establishes entry into force provisions:

—The Protocol shall enter into force twelve months after the date of deposit of instruments of ratification (or similar instruments) by ten States, provided that six of those States each has at least one million units of gross tanker tonnage.

—At the time of deposit of its instrument ratifying 1984 CLC, a State, if it is a Party to the 1971 FC or, if not, if it also deposits an instrument ratifying the 1984 FC Protocol, may declare its instrument not to be effective until the date that States which are Parties to the 1971 FC and have ratified the 1984 FC Protocol must denounce 1969 CLC and 1971 FC. (This will occur after eight States, accounting for at least 750 million tons of contributing oil, have deposited ratification instruments for the 1984 FC Protocol.) This provision permits States to avoid participating in the 1984 CLC and 1984 FC regimes during the transition discussed above under 6.b. In addition, it permits States to avoid participating in those regimes until there are a sufficient number of participating States to ensure a reasonable distribution of the burden of supporting that Fund. A State making such a declaration may later withdraw it.

—For any State depositing its appropriate instrument after entry-into-force conditions have been fulfilled, the Protocol will enter into force twelve months after such deposit.

Article 14. IMO may convene a Conference to revise or amend the Convention and shall convene a Conference of Contracting States at the request of one-third of them.

Article 15. Establishes a simplified procedure for amending the liability limits:

If one-quarter of the Contracting States request that a limit be amended, the IMO Secretary-General shall circulate the proposal to all IMO members and all Contracting States.

—Such a proposed amendment shall be considered at an IMO Legal Committee meeting held at least six months after circulation, at which all Contracting States may participate.

—No amendment may be considered before December 1, 1989, nor before entry into force of the Protocol, nor within five years of the date of entry into force of a previous amendment. Total increases under this provision may not exceed six per cent annum, compounded, of the relevant limits established in the Protocol, calculated from December 1, 1984. In no event may a limit be increased to an amount more than three times the original limit.

—When considering proposed amendments, the Legal Committee shall consider the experience of incidents, changes in monetary values, effect on insurance costs, and the relationship between the limits set under 1984 CLC and the 1984 FC.

—Amendments shall be adopted in the Legal Committee by a two-thirds majority of Contracting States present and voting, provided that at least one-half of the Contracting States are present at the time of the vote.

—Amendments so adopted shall be circulated by the Secretary-General to all Contracting States and shall be deemed accepted unless, within 18 months, at least one-quarter of the Contracting States communicate their objections.

—Amendments so accepted shall enter into force 18 months later, and all Contracting States are bound thereby, unless they denounce the Protocol at least six months before such entry into force.

Article 16. Establishes rules for denunciation:

—Denunciations may be made any time after the Protocol enters into force for a Party; they are to be deposited with the IMO Secretary-General, to take effect 12 months (or such longer time as specified therein) later.

—A State which denounces the 1984 FC Protocol but remains a Party to the 1971 FC Convention shall be deemed to have denounced the 1984 CLC Protocol as of the date on which its 1984 FC Protocol denunciation becomes effective.

Article 17. Establishes responsibilities of the Secretary-General as depositary.

Article 18. Establishes the six official languages of the Protocol's original text: Arabic, Chinese, English, French, Russian and Spanish.

B. FC

Unlike the 1969 CLC, the 1971 FC numbers its articles with Arabic numerals, rather than Roman. All references to articles of the *FC Protocol* will, therefore, be designated "FCP," to distinguish them from Articles of the FC, whether or not amended.

Article 1. Defines the following terms:

—"1984 Liability Convention"* (Art. 2.1, FCP)

—"1971 Fund Convention"* (Art. 2.2; FCP)

—"ship," "person," "owner," "oil," "pollution damage," "preventive measures," "incident," "Organization," "unit of account," and "ship's tonnage" have the same meaning as in 1984 CLC* (Art. 2.3, 2.4, 2.5, FCP)

—"contributing oil" means crude oil and fuel oil as further defined therein

—"ton", in relation to oil, means metric ton

—"guarantor," to mean anyone providing insurance or other, financial security under 1984 CLC* (Art. 2.6, FCP)

—"terminal installation"

—an incident consisting of several occurrences shall be treated as having occurred on the date of the first one.

Article 2. Establishes the 1984 Fund. The Fund to be recognized as a legal person, with rights, obligations, and capacity to be a party in legal proceedings, in Parties. Parties recognize the Fund Director as the Fund's legal representative.* (Art. 3, FCP)

Article 3. Applies to pollution damage in the same geographic area as the CLC Protocol.* (Art. 4, FCP)

Article 4. Establishes the basic elements of the compensation system:

—The Fund shall compensate persons suffering pollution damage not fully and adequately compensated under 1984 CLC, either be-

cause there is no liability under 1984 CLC, because damage exceeds the owner's liability limits, because the owner is incapable of meeting his obligations and insurance or other security is inadequate.* (Art. 6.1, FCP)

—The Fund is not obligated to pay compensation if pollution damage resulted from armed conflict or from oil discharge by a warship or other government vessel on non-commercial service, nor is it obligated to pay if the claimant cannot prove that damage resulted from an incident involving one or more ships.

—The Fund shall be exonerated wholly or partially from compensating pollution damage caused in whole or in part by the negligence of the claimant, or by his act done with intent to cause damage, provided, however, that there shall be no exoneration with respect to preventive measures.* (Art. 6.2, FCP)

—The maximum amount of compensation payable for any one incident, including any compensation actually paid under the 1984 Liability Convention, shall not exceed 135 million SDRs, provided, however, that such maximum shall increase to 200 million SDRs when any three parties together account for at least 600 million tons of contributing oil. (Art. 6.3, FCP)

—Where the amount of established claims for one incident exceeds the amount of compensation available, payments shall be made *pro rata*.* (Art. 6.4, FCP)

—The Fund Assembly, in exceptional cases, may allow payment by the Fund even where the shipowner has not deposited security in order to limit its liability.* (ART. 6,5, FCP)

—The Fund may assist Parties, in finding personnel, material, and services to enable them to undertake preventive measures. The Fund may in accordance with its Internal Regulations provide credit facilities for preventive measures.

Article 5. Deleted (Art. 7, FCP). Article 5 had provided for partial indemnification of vessel owners for Liability Convention payments over specified amounts; such indemnification will no longer be provided. This change will serve to increase the shipowner's effective liability limit. Currently, for example, a shipowner having a liability limit of $14 million can have that limit effectively reduced to $8.33 million by reason of the indemnity provided to the shipowner by the Fund. FC was adopted in 1971 on the premise that it was necessary, not only to ensure that full compensation be available to oil pollution victims, but also to give relief to shipowners for a portion of the burden imposed on them by CLC. The same consideration which led to the substantial increase in the shipowner's liability limitation under CLC Protocol (greater insurance capacity, inflation, increased costs of response, etc.) led to the conclusion that this benefit to the shipowner should be terminated by FC Protocol.

Article 6. Establishes the same limitation period for bringing actions as the 1984 CLC. (See discussions above under Article VII 1984 CLC.)* (Art. 8, FCP)

Article 7. Establishes rules regarding courts having jurisdiction over the Fund for compensation claims:

—Actions against the Fund may only be brought in courts competent to hear claims under the 1984 CLC. A competent court having an action under 1984 CLC before it shall have exclusive ju-

risdictional competence over the related action against the Fund, unless such court is in a State not Party to the 1984 FC, in which case an action may be brought against the Fund in the United Kingdom or in a State Party in which an action could have been brought against the vessel owned under 1984 CLC.* (Art. 9, FCP)

—The Fund shall have the right to intervene in actions brought under CLC and, if properly and timely notified of such actions, the Fund shall be bound by their outcome even if it has not actually intervened.

Article 8. Judgments against the Fund rendered in one State Party are enforceable in other State Parties, in the same manner as provided for in 1984 CLC. (See discussion above under Art. X 1984 CLC.)* (Art. 10, FCP)

Article 9. Grants the Fund subrogation rights against the owner and his guarantor and ensures that the Fund has a right of subrogation against other persons no less favorable than that of an insurer of a person to whom compensation has been paid.* (Art. 11, FCP)

Article 10. Annual contributions to the Fund shall be made in respect of each Party by any person who, in a particular calendar year, receives, in quantities exceeding 150,000 tons, contributing oil carried by sea to ports and installations of that Party, or receives such oil at installations of the Party after the oil has first been carried by sea and unloaded at ports or installations of a non-Party.* (Art. 12, FCP)

Article 11. Deleted (Art. 13, FCP). Article 11 of the FC established rules for the intital contributions payable when the 1971 FC enters into force for a Party; initial contribution will no longer be required. Initial contributions were required under FC to enable the expeditious establishment of the Organization's administrative machinery. In accordance with a resolution adopted by the 1984 Conference, it is expected that the current Fund Director and his staff and facilities will provide, on a reimbursable basis, services to establish the new Organization, and indeed to provide Secretariat services for that Organization. Reimbursement will be provided from annual contributions from parties to FC Protocol. Consequently, there is no need for initial contributions under this Protocol.

Article 12. Establishes rules regarding the calculation of the necessary annual contributions to support the Fund.* (Art. 14 FCP)

Article 13. Establishes rules regarding contribution arrearages, obligations of Parties to ensure payments by persons responsible for payments on their behalf, and recovery of arrearages by the Fund Director.* (Art. 15, FCP)

Article 14. A Party may declare itself bound to fulfull any obligations incumbent on persons liable to make contributions to the Fund; a State so doing shall, with respect to the obligation assumed, waive immunity it would otherwise be entitled to invoke in an action brought before a competent court.

Article 15. Obligates Parties to ensure that the Fund is aware of persons who are liable to make contributions on behalf of such States, together with the amounts of oil received by such persons. Should a Party fail to fulfill its obligations and the Fund thereby suffers a loss, the Party shall be liable to the Fund in the amount of the loss.* (Art. 16, FCP)

Article 16. Provides that the Fund shall have an Assembly and a Director. The Protocol has abolished the Executive Committee. Experience has demonstrated that the Executive Committee, originally intended to perform executive functions for the Fund Organization, has not operated in the manner intended. The Fund Assembly has not delegated budgetary functions to it; attendance at its meetings have not reflected its formal membership; and its membership lacked continuity, which was particularly important in carrying out its claims approval function. It was felt that the nature of the Fund Organization's work is such that permanent or subsidiary bodies established under Article 18.9 of the Convention would be more, capable of performing necessary detailed functions on behalf of the Assembly. It should be noted that Article 18.2 of the Protocol amends Article 18.9 of the existing Convention specifically to allow for such a delegation of functions and to assure that the membership of the bodies so established reflect not only an equitable geographical distribution, but also appropriate representation by the Fund's major contributions.* (Art. 17, FCP)

Article 17. The Assembly consists of all Parties.

Article 18. Established the functions of the Assembly, including approval of claims settlements and claims compensation apportionment, instruction of the Director on matters of administration, and establishment of subsidiary bodies as necessary (with membership to reflect geographic distribution and adequate representation of the largest contributing States).* (Art. 18, FCP)

Article 19. Calls for annual meetings of the Assembly called by the Director, and extraordinary meetings called by the Director on the request of one-third of the Assembly members, or on the Director's own initiative after consultation with the Assembly Chairman.* (Art. 19, FCP)

Article 20. A majority of Assembly members constitutes a quorum.

Articles 21 through 27. Deleted (Article 20, FCP). Articles 21 through 27 deal with the establishment and operation of the Fund Executive Committee, which does not exist under the 1984 FC Protocol.

Article 28. Declares the Director to be the Fund's legal representative and, together with the necessary staff, to comprise the Fund's Secretariat.

Article 29. Declares the Director to be the chief administrative officer of the Fund and assigns certain duties to him.* (Art. 21, FCP)

Article 30. Charges the Director and other Fund staff members to act as international officials, wholly independent of the direction of their home goverments, and requires Parties to respect that status.

Article 31. Requires all Fund expenses, save for expenses of delegations or other representatives of Parties, to be borne by the Fund.* (Art. 22, FCP)

Article 32. Establishes basic rules regarding voting in the Assembly; in most cases, decisions are by a simple majority, with each member having one vote.* (Art. 23, FCP)

Article 33. Specifies situations in which decisions require a two-thirds majority.* (Art. 24, FCP)

Article 34. Declares that the Fund shall not be subject to taxation or duties; persons contributing to the Fund or receiving damage compensation from it are subject to their applicable national legislation.

Article 35. Compensation claims arising after the date of the 1984 Protocol's entry into force may not be brought against the Fund until 120 days after that date.* (Art. 25, FCP)

Article 36. The IMO Secretary-General shall convene the Assembly no more than 30 days after the 1984 FC Protocol enters into force.

Article 36 bis. Establishes transitional provisions, for the period between the Protocol's entry into force and the date on which denunciations must be made as provided for in 1984 FC Protocol Article 31:

—The Fund will pay for compensation for pollution damage only if and to the extent that such damage has not been fully compensated under 1969 CLC, 1971 FC and 1984 CLC. In States Party to the 1984 FC Protocol, but not Party to 1971 FC, compensation is to be paid by the Fund only if and to the extent that there would not have been full and adequate compensation had 1969 CLC, 1971 FC, and 1984 CLC been in force for that State.

—In computing the amount of compensation (up to the limit of 135 million SDRs or 200 million SDRs, as appropriate) to be paid by the Fund, there shall also be considered any amounts paid under the 1969 CLC and amounts paid, or deemed to have been paid, under 1971 FC.* (Art. 26, FCP)

Article 36 ter. Establishes certain administrative rules regarding operation of the Fund during the period that both the 1971 FC and the 1984 Protocol are in force. The Director of the 1971 Fund shall be the Director of the new Fund except in cases where a conflict of interest arises. In such cases the Chairman of the Assembly serves as the representative of the new Fund.* (Art. 26, FCP)

Article 36 quarter. Declares the final clauses of the 1984 Convention to be Articles 28 through 39 of the 1984 Protocol.

1984 FC Protocol Articles not amending parts of the 1971 FC. The following articles, including the final clauses referred to in Article 36 quarter above, do not, in and of themselves, amend provisions of 1971 FC (notwithstanding that Articles 28 through 39, 1984 FC Protocol effectively replace Articles 37 through 48, 1971 FC):

Article 27. Declares that, as between Parties to the Protocol, the 1971 FC and the 1984 FC Protocol shall be read together as one instrument and that Articles 1 through 36 quarter of the 1971 FC, as amended by the Protocol, shall be known as the 1984 Fund Convention.

Article 28. Deals with signature and ratification:

—Open for signature December 1, 1984 to November 30, 1985, for States that have signed the 1984 CLC Protocol.

—States become Parties by (a) signature followed by ratification, acceptance, approval or (b) accession, provided they have also ratified, accepted, approved or acceded to the 1984 CLC Protocol.

—Parties not also Parties to the 1971 FC shall be bound by the 1971 FC as amended with respect to other Parties to 1984 FC Protocol, but not with respect to States that are Parties to the 1971 FC but not Parties to 1984 FC Protocol.

Article 29. States which have deposited ratifications to the 1984 FC Protocol shall report to the IMO Secretary-General, prior to the Protocol's entry into force for those States, which persons shall make contributions on behalf of such States and the amounts of oil received by them. During the transitional period, the Fund Director shall make such reports respecting Parties to 1984 FC Protocol to the Secretary-General.

Article 30. Entry into force provisions:

—1984 FC Protocol will enter into force twelve months after appropriate instruments have been deposited with the Secretary-General on behalf of at least eight States, which, together, received at last 600 million tons of contributing oil during the preceding calendar year; provided, however, that 1984 FC Protocol may not enter into force before the 1984 CLC Protocol.

—A State depositing the appropriate instrument may declare that it shall not take effect until the date, specified in Article 31, on which Parties to the 1971 FC that have also ratified the 1984 FC Protocol must denounce the 1969 CLC and 1971 FC. A similar declaration made with respect to the 1984 CLC Protocol shall be deemed applicable to the 1984 FC Protocol as well. Declarations may be withdrawn.

—The Protocol will enter into force 12 months after instrument deposit for any State that makes such a deposit after the entry into force conditions have been fulfilled.

Article 31. Establishes the obligation of specified States which are party to 1969 CLC and 1971 FC to denounce those Conventions. States which must do so are Parties to 1984 FC Protocol and other States which have deposited instruments of ratification to 1984 FC Protocol. Denunciation is required within six months after following conditions are met: (1) those Parties and other States are at least eight in number; and (2) the total of the contributing oil received in those Parties and other States during the preceding calendar year is at least 750 million metric tons. The required denunciations take effect 12 months following the expiry of the referenced six month period.

Article 32. IMO may convene a Conference to revise or amend the 1984 FC, and it shall convene a Conference of Contracting States for that purposes, at the request of at least one-third of them.

Article 33. Establishes a system for revising compensation limits, essentially identical in form and limitation to that established for the 1984 CLC Protocol under Article 15 of that instrument.

Article 34. Establishes rules for denunciations:

—Denunciations may be made any time after the Protocol enters into force for a Party; they are to be deposited with the IMO Secretary-General, to take effect 12 months (or such longer time as specified therein) later.

—Denunciation of the 1984 CLC Protocol is deemed a denunciation of the 1984 FC Protocol.

—A failure to denounce the 1969 CLC or 1971 FC, as called for in Article 31, shall be deemed a denunciation of the 1984 FC Protocol, to take effect 12 months after the expiry of the six-month period provided for in that Article.

—A Party's obligation to make contributions to the Fund continues, with respect to any incident occurring before the denunciation of this Protocol takes effect.

Article 35. Provides for extraordinary sessions of the Assembly in the event that a Party's denunciation may significantly increase the level of contributions of the remaining Parties. If the Assembly determines that such a denunciation will result in a significant increase in the contribution level for the remaining States, such remaining States may also denounce the Protocol, not less than 120 days before the effective date of the denunciation in question, to take effect on the same date as that denunciation.

Article 36. The Protocol shall cease to be in force on the date on which the number of Parties falls below three, but all States bound by the Protocol on the day before that date shall remain bound by it, solely for the purposes of winding up the affairs of the Fund.

Article 37. Declares that, although the Protocol may cease to be in force, the Fund shall continue to be responsible for compensation of an incident occurring before it ceased to be in force and shall be entitled to exercise rights respecting contributions necessary to wind up the Fund's affairs.

Article 38. Establishes responsibilities of the Secretary-General as depositary.

Article 39. Establishes the official languages of the original text: Arabic, Chinese, English, French, Russian and Spanish.

ENTRY INTO FORCE

A country need not ratify the original conventions in order to ratify the Protocols. If the United States follows this course, it will not participate in any international oil spill regime until the Protocols enter into force. The CLC Protocol enters into force after ratification by 10 states, six of which must have major tanker interests. The Fund Protocol enters into force after the CLC Protocol, and after ratification by eight states which account for 600 million tons of seaborne oil receipts.

TEXT OF RESOLUTION OF RATIFICATION

PROTOCOL OF 1984 TO AMEND THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention), subject to the following reservation, understandings and declaration:

Reservation

Notwithstanding Article III, paragraph 4, of the Convention on Civil Liability for Oil Pollution Damage, 1969, as amended, to the extent that oil pollution damages in respect of any one incident may exceed the total amount recoverable under said Convention

(Liability Convention), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), as amended, and the applicable U.S. Federal oil pollution liability and compensation statute, claimants may seek recovery of their uncompensated damages in courts of competent jurisdiction of the States of the United States, including its territories and possessions and the District of Columbia, pursuant to applicable State statutes and common law, after remedies available under the Liability Convention, the Fund Convention, and the applicable U.S. Federal oil pollution liability and compensation statute have been exhausted, except that in any such action under a State statute or common law for such uncompensated damages, no claimant shall be entitled to assert any substantive or procedural right based on any provision of the Liability Convention or the Fund Convention.

Understandings

(1) The United States understands that the definition of pollution damage in Article I, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended by Article 2, paragraph 3 of the 1984 Protocol thereto, does not exclude reasonable and directly related loss of tax revenue to the United States, its States and territories and subdivisions thereof, and the District of Columbia.

(2) The United States understands that nothing in the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, prevents any claimant from combining damage awards from two or more incidents which have injured the same or adjacent resources to fund a restoration project which addresses those incidents.

(3) The United States understands that the definition of pollution damage in Article I, Paragraph 6 of the International Convention of Civil Liability for Oil Pollution Damage, 1969, as amended by Article 2, paragraph 3 of the 1984 Protocol thereto, includes loss of profit or impairment of earning capacity caused by damage of the environment by an oil pollution incident.

(4) Any damages not compensable due to the definition of pollution damage in Article I, paragraph 6 of the International Convention on Civil Laibility for Oil Pollution Damage, as amended by Article 2, paragaph 3 of the 1984 Protocol thereto, or by any future interpretation of the Liability Convention as so amended, may be provided for by laws of the United States, its States, territories or the District of Columbia.

(5) The United States understands the definition of pollution damage in Article I, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended by Article 2, paragraph 3 of the 1984 Protocol thereto, to include loss of use of subsistence resources.

(6) The United States understands the definition of pollution damage in Article I, paragraph I, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended by Article 2, paragraph 3 of the 1984 Protocol thereto to include directly related and reasonable costs of investigation, assessment of damage and court costs, excluding defense costs.

Declaration

In accordance with Article 13 of the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, the United States declares that its instrument of ratification of that Protocol shall be deemed not to be effective for the purpose of said Article 13 until the end of the six-month period described in Article 31 of the Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

Text of Resolution of Ratification

PROTOCOL OF 1984 TO AMEND THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1971

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention), subject to the following understandings and declarations:

Understandings

(1) The United States understands that nothing in the Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage prevents any claimant from combining damage awards from two or more incidents which have injured the same or adjacent resources to fund a restoration project which addresses those incidents.

(2) Any damages not compensable due to the definition of pollution damage in Article I, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage, as amended by Article 2, paragraph 3 of the 1984 Protocol thereto, or by any future interpretation of the Liability Convention as so amended, or of the International Convention of the Establishment of an International Fund for Compensation for Oil Pollution Damage, as amended by the 1984 Protocol thereto, may be provided for by laws of the United States, its States, territories or the District of Columbia.

Declarations

(1) In accordance with Article 30 of the Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, the United States declares that its instrument of ratification of that Protocol shall not take effect for the purpose of said Article 30 until the end of the 6-month period described in Article 31 of that Protocol.

(2) In accordance with Article 14 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as amended, the United States declares that it assumes itself all obligations that are incumbent under the Convention on all persons who are liable to contribute to

the International Oil Pollution Compensation Fund 1984 (the Fund) in accordance with Article 10, paragraph 1, in respect to oil received within the territory of the United States. The Fund shall be entitled to enforce all such obligations exclusively under the applicable U.S. Federal oil pollution liability and compensation statute.

○